65. The vast weight of the testimonial evidence at the hearings proved that these repeated tone transmissions were by *no* means "normal" testing procedures. But, this "testing" did cause interference to RAM's transmissions. (Tr. 141-42, 254-55).

66. The person responsible for maintaining Capitol's transmitter network on a contract basis, Billy C. McAllister, testified that he installed and tested Capitol's "link" at approximately the same time that he installed and tested Capitol's Huntington and Charleston base stations, because "the Huntington transmitter couldn't operate unless it had -- unless it heard information from Charleston." (Tr. 647).

67. Mr. McAllister testified that he tested the paging system "intermittently" after the initial construction, but only "for a day or so ...." (Tr. 647). He testified that his testing would not have been 24 hours a day. (Tr. 648-49). He testified that he did not use a two-tone sequence to perform his testing of Capitol's system. (Tr. 650-51). He also testified that his testing would be accomplished with a "test" pager. (Tr.651-52). That testimony was entirely at odds with the sort of "testing" that Capitol claimed to be doing in July and August of 1991.

68. RAM's officers, and the FCC's Field Engineers testified that Capitol's "test" pattern went on day and night, sometimes 24 hours a day. (Tr. 136, 290-91, 319, 329). Sometimes the "test" transmissions transmitted on top of RAM transmissions, thereby causing those pages to be lost or delayed. (Tr. 114, 254, 353). Consequently, RAM customers, which included local doctors, sheriffs

and ambulance services were suffering from lost pages or extended delays in receiving their pages. (Tr. 487, 490, 504-05).

69. RAM testimony concerning the repeated tone transmissions was corroborated by the FCC's Field Engineers. The Field Engineers determined from their inspection that the repeated sequence of tones appeared to be generated by Capitol's paging terminal. (Tr. 116). The Field Engineers asked Capitol's owner, Dan Stone, to explain the purpose of the test: he first said it had to do with testing the "link transmission system." When Mr. Walker questioned the validity of that answer, he changed his answer to state that Capitol was testing "coverage." (Tr 129, 141).

70. Mr. Walker testified that the tone sequence was transmitting as late as midnight one night prior to his inspection of Capitol's facilities; and that if those tones interfered with RAM's transmissions at that hour, he knew of no way that Capitol could have prevented that interference. (Tr. 141-42).

71. Another Capitol employee, Russell Harrison, offered an entirely different explanation, that Capitol was testing the "group calling" function. But, the FCC's Field Engineers never identified any legitimate "group call" testing.

72. The Field Engineers expressed doubts about all of Capitol's explanations. (Tr. 1462-1465). During the inspection, the Field Engineers asked Capitol to activate any one of their test pagers; they could not do so. (Tr. 118). The Field Engineers testified that Capitol's transmissions were "not to subscribers or customers." (Tr. 259).

73. The so-called "testing" transmissions were monitored as late as midnight, an hour when it was unlikely that any Capitol personnel would have been available to monitor those transmissions. (Tr. 134). The Field Engineers saw no correlation between the repeated tones and what would typically be done to test a "link" problem. (Tr. 130). And though a tone sequence could be used to test signal "coverage", Capitol's employees could not get the tone sequence to activate any of the "test" pagers that they showed to the Field Engineers. (Tr. 118).

74. The Field Engineers were unable to determine the existence of any actual Capitol paging customer on 152.480 at any time during their August 1991 investigation. (Tr. 255-56). Those findings corroborate RAM employee testimony: more than one RAM employee testified that they "never" heard any actual Capitol customers operating on the 152.480 frequency. (Tr. 497-98).

75. Even Capitol's so-called "expert" PCP witness did not see any evidence that would explain to him why Capitol's repeated tone transmissions could be considered a "legitimate" test. (Tr. 1141). Rather, Capitol's "expert" witness, Arthur Peters, testified that one way to cause interference to another shared channel licensee would be to engage in excessive "testing". (Tr. 1141-42). He testified that excessive "testing" would make it difficult for another licensee to transmit legitimate paging traffic. (Tr. 1142). That is apparently precisely what Capitol did throughout the summer of 1991.

76. If Capitol did have any legitimate paging customers

operating on its PCP system, it is difficult to imagine why those customers would have put up with the prolonged paging delays, and lost pages, that were caused by Capitol's repeated "testing" of its PCP station. Presumably, if RAM's customers' pages were being delayed or lost due to Capitol's two-tone transmissions, surely the same interference would have occurred to Capitol's PCP customers if such customers existed.

77. On the other hand, if the repeated two-tone test sequence transmissions did not serve any legitimate operating purpose, then Capitol's statements to the contrary to FCC Field Engineers, and to the Bureau in response to its Notice of Apparent Liability, would have been willful misrepresentations of fact. In fact, the evidence is overwhelming that these extensive transmissions served no purpose other than to tie-up the shared frequency, and cause interference to RAM's legitimate paging traffic.

"Duplicate Paging" Interference.

78. Another form of interference to RAM's PCP operations occurred during the months of August through October 1992. RAM customers complained about receiving "false" pages. (Tr. 379-80). RAM's radio technician, Luke Blatt, under the supervision of Raymon Bobbitt, went to the field to attempt to identify the problem. (Tr. 381, 470-72).

79. This technician travelled to an office location in Charleston, which is one of the towns in which both Capitol and RAM have PCP transmitters. There, he set-up two receiver/testing devices called "Hark verifiers." (Tr. 470). One of the verifiers

was tuned to receive transmissions only from the 152.510 RCC frequency, Capitol's RCC frequency; the other verifier was tuned to receive transmissions only from the 152.480 PCP frequency. (Tr. 394-95, 470).

80. These verifiers were connected to printers that would print out a rough translation of the electronic transmissions being transmitted over those two frequencies. (Tr. 470). Mr. Blatt and Mr. Bobbitt compared the two studies side-by-side, and determined that some of Capitol's RCC pages were also being sent out over the 152.480 PCP frequency. Mr. Bobbitt testified that the verifier studies showed "beyond a shadow of a doubt" that duplicate pages were being transmitted from Capitol's RCC frequency to the shared PCP frequency. (Tr. 471). Those print-outs were submitted into the record as Bureau Exhibits 16 (for the 152.480 frequency) and 17 (for the 152.510 frequency).

81. Luke Blatt, the technician who conducted these tests, and Raymond Bobbitt, the RAM officer who reviewed and supervised these tests, compared the two reports and found many instances where one of Capitol's RCC pages, identified by capcode and data content, was also transmitted over the shared 152.480 frequency. Though some of the digital data could not be accurately read by the Hark verifier, Mr. Blatt could recognize enough identical information between the two reports to conclude that duplicate pages had been sent. (Tr. 416-18). These witnesses, and even Capitol's Vice President, Mr. Raymond, explained how this "duplicate" paging could occur.

82. Various witnesses testified that a so-called "chain"

command could be entered into Capitol's Commonwealth paging terminal, for any of Capitol's RCC paging customer accounts. (Tr. 425-26, 475). That command would tell the paging terminal to automatically "chain" a page from one particular Capitol RCC pager, operating on "channel 1", Capitol's RCC channel, to a different capcode/pager number, operating on "channel 2", which in this case was the 152.480 channel. (Tr. 426-35). That chain command could be entered by someone with minimal training on how to enter commands into a paging terminal. (Tr. 479-80). The chain command could be entered without the paging customer's knowledge, and it would not have caused any delays to Capitol's RCC customer pages. (Tr. 1006).

83. Once the chain command was entered into the Capitol customer account, any time a page was sent to that Capitol customer, the paging terminal would automatically send, or in paging parlance "chain", another page to a different pager with a different associated capcode; that capcode could have been "fictitious." (Tr. 1000-06).

84. Though there could be legitimate uses for such a "chain" command (Tr. 495), in this case, the chaining command was sending out false pages to RAM customers. The "fictitious" capcodes were in reality actual RAM paging customer capcodes. In other words, pages intended for Capitol's RCC customers would, within seconds or a minute or two, also be automatically sent to an unsuspecting RAM customer on the 152.480 frequency. That "chaining" interference was evidently programmed into Capitol's paging terminal. (Tr. 502).

85. Kenneth Hardman, Capitol's attorney, suggested in his cross-examination of Luke Blatt that the manufacturer of Capitol's paging terminal claimed that this "repeat" page interference problem could not be accomplished with their paging terminal. (Tr. 426). However, his client, Mr. Raymond, testified in remarkable detail precisely how his terminal's chain command could indeed be used to cause this "repeat" page interference to RAM's transmissions.

86. Mr. Raymond testified that the chaining process was actually "not that complicated." (Tr. 1000-04). He explained, with greater detail than any other witness in the hearings, precisely how to program "up to 25 pagers" with the chain command, using fictitious numbers. (Tr. 1000-04). The clarity and detail of Mr. Raymond's explanation was all the more remarkable in light of his testimony that, prior to listening to RAM's witnesses testify at the hearings, he did not believe that it was possible to cause a page to "repeat" the way those witnesses had described the interference problem. (Tr. 1007-08).

87. Mr. Peters suggested that RAM or some unidentified third party might have somehow sabotaged RAM's paging network to "set-up" Capitol for FCC sanctions. His speculation, however, was undermined by Mr. Raymond's own testimony, unsupported by any record evidence, at odds with the testimony of the witnesses who investigated the repeat page problem in the field, and strains credulity.

88. While these interference problems continued on the

152.480 shared frequency; Capitol was successfully adding new customers every year to its exclusive RCC channels. Capitol's Vice President was obviously proud to claim that Capitol had very high customer growth rates beginning in 1989, the year that he joined that company, continuing to the present, with thousands of additional paging units being activated every year. (Tr. 831). During that same time period, however, Capitol's PCP channel was conspicuously devoid of similar, high customer activity. In light of these strident customer growth rates on Capitol's RCC channel, it is difficult to understand why no RAM employee, and no FCC Field Engineer, could detect any customers on Capitol's PCP system. Unless, of course, Capitol never actually intended to use that PCP system for its intended purpose.

CONCLUSIONS OF LAW

89. The vast weight of the record evidence shows that Capitol applied for a PCP license, and then operated its PCP station in repeated violation of the FCC's Rules, to the obvious detriment of a shared channel competitor, RAM. There was scant evidence that Capitol ever made any serious effort to use its PCP station for its intended purpose: to provide interference-free paging services on a commercial basis. Rather, the vast weight of the evidence proves that it is more likely than not that Capitol's primary purpose was to cause interference to RAM's shared channel operations.

90. In so doing, Capitol caused economic hardship to RAM, and impeded service to RAM's customers. That conduct was unbefitting of an FCC licensee, and constitutes sufficient grounds to warrant

severe sanctions against Capitol, including forfeitures and license revocations.

Abuse of Commission Application Processes.

91. The Commission has stated that when it is presented with evidence that a party has submitted filings "with anything less than good faith," it will "take a closer look" to determine whether there has been an attempt to abuse the Commission's processes. See Empire Paging Corp., 48 RR 2d 1637 (Com. Car. Bur., 1981) (concerning allegations of abusive petitions to deny). The record evidence shows that it is more likely than not that Capitol filed its 152.480 PCP application, and subsequently operated that station, for the principal purpose of causing interference to RAM's 152.480 PCP operations.

92. It is almost impossible to reconcile the record evidence with any other conclusions. RAM had operated on this shared channel in harmony with other licensees prior to Capitol's installation of its PCP station. RAM had heard that Capitol might cause harmful interference on that channel, and, most certainly, such interference began shortly after the September 1990 grant of Capitol's PCP license. There was scant and conflicting evidence as to whether Capitol ever had any legitimate customers on its PCP system; certainly no RAM employees nor FCC Field Engineers ever heard any Capitol paging customers using the 152.480 frequency.

93. Though Capitol also complained that RAM had interfered with its operations, there was no evidence that Capitol ever

transmitted anything other than alleged "test" patterns, Morse Code identifications, and voice pages from Capitol employees. Conversely, RAM repeatedly experienced interference, and its customers complained of interference, for a period of more than two years, coinciding with Capitol's PCP operations.

94. Even if we were to assume that Capitol's original intent was to actually operate a PCP station, it apparently abandoned such intentions shortly after obtaining its license. Its system was built with borrowed equipment, operated below its authorized power, and left to run in "test" mode for hours on end. Surely, Capitol never used the 152.480 frequency as it was intended to be used by licensees such as RAM. This is a violation of every licensee's primary duty under the Communications Act.

95. In the case of A,F&L Telephone, FCC mimeo 81-112 (March 21, 1981), a Petition to Deny was filed against a license renewal application alleging non-use of PLMS frequencies. The Commission held that this allegation "was a serious charge related directly to our primary function of promoting efficient use of radio communications facilities." Id. at 3. In response to the allegation, the Commission rescinded the applicant's license renewals, and designated its applications for hearing to resolve the frequency use issue. Id. at 3,5.

96. As the Commission stated in A,F&L Telephone, the requirement that an applicant be able to establish need for a frequency is found in the Communications Act in the first instance. See 47 U.S.C. §151. Capitol obviously never had a need to use the

PCP frequency; rather, its "use" of that license served only to harm other, legitimate license operations.

97. In short, the record evidence proves that Capitol filed its PCP application in bad faith, and then failed to put that station to use, in violation of the Act. Capitol thus lacks the requisite character qualifications to be a Commission licensee. See Empire Paging Corp., 48 RR 2d 1637, 1640.

Willful, Malicious Interference to RAM's Operations

98. Apparently, PCP licensees must accept the possibility of interference problems when operating in a shared frequency environment. The problems experienced by RAM in this case, however, were well beyond the acceptable norm: RAM pages were often lost due to Capitol's transmissions. RAM paging customers, including doctors, ambulance services, and police officers, complained about the delays and the quality of RAM's paging service.

99. The interference problem began only after Capitol obtained its PCP license, and ended only when Capitol ceased transmitting. Often, RAM employees specifically identified Capitol as the source of the interference. The FCC's Field Engineers determined that Capitol's repeated transmission of a tone sequence caused interference to RAM, and it did not appear to serve any legitimate paging purpose.

100. The 152.480 frequency is shared by more licensees than RAM and Capitol; yet, after eight days of testimony, the only

verifiable source of interference on the 152.480 frequency was Capitol.

101. Though one or two isolated incidents of interference on the 152.480 frequency could be considered unintentional or coincidental, the acts of interference in this case displayed a level of sophistication, regularity, and severity that simply could not be attributable to chance.

102. The manner of interference was not the same throughout this extended time period; rather, the nature of the interference grew more sophisticated over time. In the beginning, the interference was caused by failure to properly monitor transmissions and by the retransmission of RCC paging traffic onto the shared PCP frequency. Later, a terminal-generated tone sequence, that obviously emanated from Capitol's station, wreaked considerable havoc on RAM's transmissions for weeks, ending only when FCC Field Engineers inspected Capitol's station.

103. Finally, a sophisticated "chaining" code caused false paging to occur to RAM's customers. Capitol's Vice President, who professed to know little about programming a paging terminal, was remarkably lucid and detailed in describing how the chaining command could be set-up to cause that interference.

104. It is almost impossible to reconcile all of these facts and "coincidences" with Capitol's expressions of innocence or its "sabotage" theories. Certainly, the repeated tone-sequence transmissions, and the slow Morse Code identification interference, was caused by Capitol, as verified by the FCC's Field Engineers.

105. The other methods of interference all had at least one thing in common: Capitol's transmissions. In every instance of interference, a RAM employee identified a Capitol call sign, or a Capitol capcode, or even a Capitol employee voice with the harmful transmissions.

106. Since it had been licensed to operate on the same frequency that RAM used, Capitol surely had the ability and the opportunity to cause this harmful interference. A motive for the harmful interference requires little imagination: RAM and Capitol competed for paging customers in the same, relatively small market. Capitol admittedly attempted to solicit RAM customers by explaining the advantages of exclusive RCC channels over shared PCP channels. It may not be a coincidence, then, that subsequent, repeated instances of interference on the 152.480 PCP channel would have confirmed the premise behind Capitol's anti-PCP advertising campaign.

107. It also cannot be ignored that the qualms expressed by RAM to the Bureau about the likelihood of harmful interference should Capitol's PCP application be granted, turned out to be well founded.

108. Finally, with regard to Capitol's "sabotage" theories, it would be yet another remarkable coincidence that this "phantom" saboteur caused interference only to the 152.480 PCP frequency, not to Capitol's RCC paging frequencies. Presumably, any saboteur who had access to Capitol's paging terminal, would have caused problems to Capitol's RCC paging customers, unless it was a Capitol

employee. It is another disturbing fact that the only reported "false page" problems occurred to RAM's customers.

109. In short, a more compelling case of willful, malicious interference could hardly be imagined. It cannot be seriously doubted that Capitol was the cause or the instigator of most, if not all, of these repeated instances of harmful interference to RAM's competitive paging operations.

110. The penalties for Capitol's willful violations of Section 90.403(e) of the Commission's Rules, and Section 333 of the Communications Act, should send an appropriate warning that such actions cannot be tolerated in a shared frequency environment. In this case, Capitol's actions threatened communications services used by doctors, ambulances, and law enforcement agencies. It is easy to envisions the harm to life, limb and property that such reckless conduct could have caused.

111. With close to 30 years prior experience in the RCC paging business, Capitol surely should have known better than to engage in the type of harmful operational conduct that the record so vividly reflects. Capitol's witnesses did not appear to show any remorse, or accept any responsibility for the interference problems that occurred to RAM; so there is no reason to believe that Capitol would not engage in similar conduct in the future. Accordingly, license revocation is an appropriate remedy.

Licensee Ineptness

112. The record evidence established a pattern of irresponsibility, carelessness, and inability to exercise proper

licensee behavior, for which Capitol's licenses should be revoked. See Arizona Mobile Telephone Company, 66 F.C.C.2d 691,703 (1977); Star Stations of Indiana, 51 F.C.C.2d 95 (1967).

113. In this case, the instances of Capitol rule violations, and negligent operation of its PCP station, were legion: failure to properly monitor co-channel transmissions; failure to keep call sign identification to a minimum; questionable subscriber records; which, in light of PCP user eligibility restrictions, would have hampered FCC compliance efforts; the continued transmission of dubious "tone" signals without monitoring their harmful impact on co-channel operations; and failure to cooperate with co-channel licensees to eliminate the possibility of harmful co-channel interference.

114. The Commission has found that a "pattern of questionable conduct" is clearly relevant to a determination of whether such conduct would likely occur in the future. Arizona Mobile Telephone Co., 66 F.C.C.2d 691,703. Capitol has proven by its conduct that it is incapable of exercising proper licensee conduct. Accordingly, the FCC should determine that Capitol is incapable of fulfilling its duties and responsibilities as a licensee, and revoke its FCC licenses. See Edward G. Atsinger, 29 F.C.C.2d 443 (Rev.Bd. 1971).

Misrepresentations of Fact; Lack of Candor

115. The facts strongly suggest that Capitol officers made intentional misrepresentations of fact to the FCC, or, at a minimum, that they were noticeably lacking in candor with the FCC

with respect to Capitol's PCP operations. With the exception of the testimony of Capitol's hired witness, who was not a witness to any of the interference problems, there was not a scintilla of evidence that Capitol's repeated transmissions in July and August of 1991 had anything to do with the legitimate testing of its PCP station. To the contrary, the FCC's Field Engineers obviously doubted the stories they were told by Capitol's officers and employees. The record also provides ample evidence to question Capitol's vague assertions that it was indeed providing service to any paging customer.

116. The FCC has repeatedly warned that "candor remains the primary index by which we measure a licensee's reliability." Seven Hills Television Co., 2 FCC Rcd. 6867, 6889 (1987). Misrepresentation and lack of candor findings are certainly relevant to this agency's licensing decisions; such findings would be sufficient grounds for revocation of Capitol's licenses. See TeleSTAR, Inc., 3 FCC Rcd. 2860, 2866 (1988).

117. In light of Capitol's intentional misrepresentations to FCC officials about its paging operations, Capitol's FCC license authorizations should be revoked. See, e.g., Sea Island Broadcasting Corp. of S.C., 60 FCC 2d 146, 157 (1976) (once the FCC determines that it cannot rely on the accuracy and truthfulness of a licensee's representations, "the only suitable penalty is revocation of the license"); Nick J. Chaconas, 35 F.C.C. 2d 698 (1972).

Respectfully submitted,

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April 8, 1994

CERTIFICATE OF SERVICE

I, Glenda Sumpter, a secretary with the law firm of Joyce & Jacobs, hereby certify that on this 8th day of April, 1994, copies of the foregoing Proposed Findings of Fact and Conclusions of Law were served, by hand delivery, upon the following:

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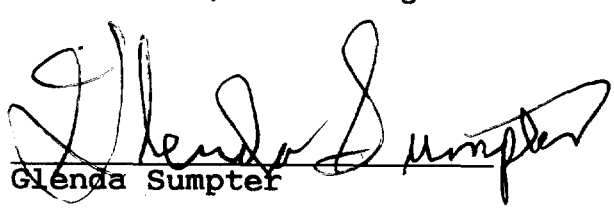

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* denotes hand delivery.

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